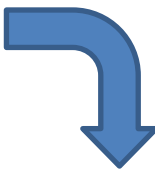
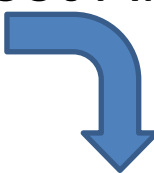
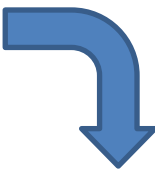


THE NEW ARTICLE 32: A VLC PERSPECTIVE

LCDR Jonathan Freimann, JAGC, USN
Victims' Legal Counsel Program
Europe, Africa, Southwest Asia
NSA Naples

Current Trend with Article 32's

- Section 1744 of FY14 NDAA and ALNAV 052/14–elevated review
- Only required post Article 32 and Article 34
- Risk in CA taking case with evidentiary problems to Article 32 – a.k.a. “giving the victim day in ‘court’”
- More non-pros's and fewer Article 32's

NEW rules for Article 32

- Apply to ALL Article 32's, regardless of when crime occurred
 - “Hearings” NOT “investigations”
- Limited experiences to rely upon



Standard Defense Objection

- RCM 405 \neq ALNAV 086/14
- RCM 405 \geq ALNAV 086/14

FY15 NDAA → statute overrides Prez's rulemaking authority

- does “what's left” in RCM 405 trump the ALNAV
 - i.e alternatives to testimony
- or does it supersede/moot RCM 405 entirely
 - end the existence of “pretrial investigations” and “investigation officers”?
 - i.e. removed the old Article 32 and replaced with a new one
- Remedy?
 - New Article 32 while old RCM on books
 - BUT once new RCM 405 is enacted, then what?

Optional Testimony of Victim

- Definition of “victim”: person who is
 - 1) alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered AND
 - 2) is named in one of the specifications
- More narrow definition than Article 6b


Optional Testimony of Victim

- Pro's to testifying
 - 1) Practice/less intimidating at trial
 - 2) ~~Depositions~~
 - Article 49: depositions only when “exceptional circumstances” and “in the interest of justice” to preserve the testimony for use at preliminary hearing or court-martial
 - 3) Interview with defense
 - RCM 701(b)(4): Each party shall have . . . equal opportunity to interview witnesses
 - Remedy if refuse?
 - 4) Can failure to testify be used against victim in Article 32?

Optional Testimony of Victim

- Pro's to not testifying
 - 1) Public testimony + cross examination = re-victimization
 - 2) Expedited transfers – return to “scene of the crime”
 - Telephonic testimony?
 - 3) Remove huge tool from defense tool kit to discredit victim

Optional Testimony of Victim

- Practice tip:
 - video record NCIS interview
 - Captures emotion
 - More clarity than written statement
 - BUT can be used to contrast later testimony
- Note: video does NOT need to be sworn
 - “”
 - Any “reliable” evidence can be considered, including unsworn statements

Scope/Purpose of New Article 32's

- ALNAV 086/14 mentions the “limited scope and purpose of the preliminary hearing” . . . 23 times
- “Not intended to serve as a means of discovery” . . . 4 times
- But is it that much more limited than the old Article 32's?

Scope/Purpose of New Article 32's

- 1) Determine whether there is PC to believe an offense has been committed and the accused committed it
- 2) Determine whether there is jurisdiction over the offense and the accused
- 3) Consider the form of the charges
- 4) **Recommend disposition**

Standard

Big change?

“Reasonable grounds”  “probable cause”

- Black’s Law Dictionary of “probable cause”:
 - More than a bare suspicion, but less evidence than would justify a conviction
 - “Reasonable grounds to suspect”

MRE 412/MRE 513



MRE 412

- Must have notice at least 5 days prior to hearing
- Can only consider (1) sources of injury, semen, or other physical evidence or (2) prior instances of sexual behavior with the accused
- **Constitutional Exception Does Not Apply at Art 32**
- If presented – must close courtroom and seal 412 motions/evidence/testimony
- VLC/victim have a right to be present and heard

MRE 412/MRE 513



MRE 513/514

- Must have notice at least 5 days prior to hearing
- PHO does not have the authority to order production of 513/514 evidence
 - If MRE 513/514 evidence is offered, PHO can conduct an *in camera* review to determine admissibility
- **Constitutional Exception Does Not Apply at Art 32**
- If presented – can close courtroom upon request and good cause
- Must seal 513/514 motions/evidence/testimony
- VLC/victim have a right to be present and heard

MRE 412/MRE 513

Sealing

- It is clear that any evidence heard in the hearing and ultimately not considered should be sealed,
- It not very clear on what should happen with 412/513 evidence that is admitted/considered.

MRE 412/MRE 513

Sealing

- NJS's take: best practice is for the PHO to still seal evidence that is admitted/considered
 - The ALNAV states that such evidence is to be protected under the Privacy Act and that the PHO has authority to seal exhibits. So in order to protect the victim's privacy rights, even with admitted 412/513 evidence, best practice is to seal it.
- If there are two batches of 412/513 evidence that are both sealed (one admitted/considered, the other not), the PHO should ensure they are clearly marked so that the CA and other reviewing authorities know which is which.
- Although the ALNAV doesn't give clear guidance, NJS's take is that even if the PHO decides to comment on 412/513 evidence in their report, he/she should seal that section of the report

PHO

- Whenever practicable, equal or senior to the accused and counsel and JAG
- Not an advocate
- No subpoena power
 - If the PHO orders the TC to subpoena evidence, and the TC declines, the PHO's remedy is . . . to note the refusal in the report
- No continuances allowed unless explicitly authorized by the CA

Production of Witnesses

“Reasonably available” witnesses →

“Relevant, not cumulative and necessary”

- Pre-hearing conference with TC, DC, and PHO
- If PHO approves military witness → CO of witness decides if available
 - Balancing test based on operational necessity, importance of witness
 - Can permit testimony via VTC, telephone, or live
 - The CO’s determination of unavailability is final
 - Does CO need to document balancing test?

Production of Witnesses

“Reasonably available” witnesses →

“Relevant, not cumulative and necessary”

- If PHO approves civilian witness → GC invites the witness
 - Witness has choice
 - If expenses are incurred – CA determines if witness testifies live or via VTC/phone
 - Balancing test based on cost, importance of witness, willingness to testify, and for child victims – traumatic effect of in-person testimony

Accused Unsworn Statement

The Accused may make an unsworn statement

Closing the Courtroom

Preliminary hearings are public proceedings and should remain open to the public whenever possible

- Provision in ALNAV that permits closing the hearing to spectators “when an overriding interest exists”
- One of the examples – “protecting the safety or privacy of a witness or alleged victim”
- CA or PHO must conclude that no lesser methods short of closing the hearing can be used to override interest of the case

QUESTIONS?

